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JAKS SDN BHD v. JAKS ISLAND CIRCLE SDN BHD (IN LIQUIDATION)

HIGH COURT MALAYA, SHAH ALAM
CHOONG YEOW CHOY JC
[ORIGINATING SUMMONS NO: BA-24NCC-95-08-2023]
4 APRIL 2024

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Abstract – *In determining whether a debt settlement exercise was made within or outside the period of six months preceding a company's liquidation as provided under s. 528 of the Companies Act 2016, regards should be had to the date when the debt settlement exercise was agreed to be entered by the parties, and not to the date when the debt settlement exercise was formalised.*

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COMPANY LAW: *Liquidation – Undue preference – Debt settlement exercise – Property developer and company entered into contra arrangement to transfer five units of serviced apartments as contra to claim of debt – Company subsequently went into liquidation – Whether contra arrangement fraudulent, void and ran afoul of rules against undue preference – Whether contra arrangement entered within period of six months preceding liquidation – Whether in determining effectual and material date of contra arrangement, regards to be had to date when parties agreed to enter into contra arrangement or date when contra arrangement was formalised – Companies Act 2016, s. 528*

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The plaintiff was a private limited company, while the defendant was a company involved in the business of property development. Pursuant to a mixed-development project launched by the defendant, the plaintiff was appointed to carry out the superstructure works for the said project. However, after the completion of the works, the defendant failed to make any payments to the plaintiff. This caused the parties to enter into a contra arrangement where the defendant agreed to transfer its five units of serviced apartments to the plaintiff to contra one of the claims initiated by the plaintiff against it ('contra arrangement'). The sale and purchase agreements to transfer the said units were executed by the parties on 14 December 2021 ('five SPAs'). Nonetheless, on 18 April 2022, the defendant was placed into a creditors' voluntary liquidation. The defendant then refused to give effect to the contra arrangement on the ground that the same was fraudulent, void and ran afoul of the rule against undue preference because it was entered within the period of six months preceding the defendant's liquidation as per s. 528 of the Companies Act 2016 ('CA') ('twilight period'). In the present originating summons, the plaintiff sought to validate the five SPAs. In support, the plaintiff submitted that, considering that the letter of offer together with the contra advice for the contra arrangement were signed by the plaintiff on 15 September 2021 and, the contra arrangement was duly placed in the defendant's record on that date, the effectual and material date

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of the contra arrangement was 15 September 2021 and not 14 December 2021. Hence, the contra arrangement was entered outside the twilight period and not within.

Held (allowing originating summons):

(1) The originating summons was allowed. For the purpose of determining whether the contra arrangement was made within or outside the twilight period as provided under s. 528 of the CA, the relevant date was the date when the parties agreed to the contra arrangement, *ie*, 15 September 2021, and not the date of the execution of the five SPAs, *ie*, 14 December 2021. (paras 40 & 41)

Case(s) referred to:

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] CLJU 44; [1988] 1 LNS 44 SC ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] CLJU 47; [1985] 1 LNS 47 SC ***(refd)***

Re Clifton Place Garage Ltd [1970] 1 Ch 477 ***(refd)***

Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor [2016] 7 CLJ 823 FC ***(refd)***

Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC ***(foll)***

TIC Technologies Sdn Bhd (In Liquidation) v. Mohamad Suhaimi Mohamed Taib & Ors [2019] 9 CLJ 422 HC ***(refd)***

Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals [2013] 3 CLJ 969 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 223, 291, 293

Companies Act 2016, ss. 451(1), (2), 461(1), (2), 528(1), (4), (5)

For the plaintiff - Nurul Hanani Azamuddin; M/s Raj, Ong & Yudistra
For the defendant - Chong Man Yee; M/s Wilson Lim

Reported by Syamim Ariffin

JUDGMENT

Choong Yeow Choy JC:

Introduction

[1] The plaintiff is seeking to protect its interests as a creditor of the defendant company.

[2] The defendant, which has been placed in creditors' voluntary liquidation and acting through its liquidator, is seeking to protect the interests of all creditors.

[3] The plaintiff, through its originating summons, is seeking to validate five sale and purchase agreements it had entered into with the defendant as a result of a contra arrangement for a purported debt of over RM11,000,000 due and owing to the plaintiff.

[4] The defendant opposes the originating summons on the sole ground that the sale and purchase agreements were executed within the six-month "twilight period" of the company being wound up – as provided in s. 528 of the Companies Act 2016 – thus rendering the sale and purchase agreements to be deemed as fraudulent and void and as running afoul of the rule against undue preference.

The Vital Issue

[5] The single poser for determination in this originating summons concerns the effective date for calculating the "twilight period" as provided in s. 528(1) of the Companies Act 2016, that is, whether the effective or material date of the contra arrangement was within or outside the six-month twilight period.

The Parties And Their Contentions

[6] The plaintiff, Jaks Sdn Bhd, is a private limited company.

[7] The defendant, Jaks Island Circle Sdn Bhd, is a property developer. As noted, the defendant is now in liquidation.

[8] The plaintiff was appointed by the defendant to conduct superstructure works for a proposed mixed development project in which the defendant was the developer.

[9] The plaintiff's case, in support of its originating summons, is premised on the ground that it is a creditor of the defendant by virtue of the fact that it had carried out the works for the defendant, claims had been made for outstanding amounts owed to it by the defendant and a contra arrangement was reached between the parties whereby it was agreed that five units of service apartments belonging to the defendant be used to contra one of the claims made by the plaintiff against the defendant. Based on the above background facts, the plaintiff argued that it was entitled to the reliefs sought in the said originating summons.

[10] The prayers sought by the plaintiff in its originating summons are for:

> First, leave pursuant to section 451(2) of the Companies Act 2016 to commence this action;
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> Second, declarations that 5 sale and purchase agreements entered into between the Plaintiff and the Defendant in respect of 5 units of service apartments developed by the Defendant in a project known as Pacific Star @ Section 13 in Petaling Jaya, Selangor are valid and effective;
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> Third, a consequential order that the Liquidator of the Defendant do all that is necessary including but not limited to executing a Memorandum of Transfer for all 5 parcels of land described as Unit E-22-11, Unit E-22-03, Unit E-22-03A, Unit E-27-01 and Unit E-28-01 and/or any other documentation required to effect the transfer of ownership of the said parcels of land from the Defendant to the Plaintiff and/or its nominees;

Fourth, that costs to be paid out of the Defendant's Company Liquidation Account; and

Fifth, any further, or other, or ancillary relief or directions for the Plaintiff, as this Court deems fit and proper.

[11] Crucially, it is the plaintiff's contention that since the defendant was placed into creditors' voluntary liquidation on 18 April 2022, six months preceding the creditor's voluntary winding up would be 18 October 2021.

[12] It is not disputed that when the plaintiff and the defendant entered into a contra arrangement on 15 September 2021, that was outside the six-month twilight period. However, it is also undisputed that at the time the sale and purchase agreements between the parties were executed, that is, on 14 December 2021, it was well within the six-month twilight period.

[13] The plaintiff's submission is that the sale and purchase agreements date of 14 December 2021 was a mere formalisation of the contra arrangement. According to the plaintiff, the letter of offer by the defendant, together with the contra advice signed by the plaintiff formed a contract for the contra arrangement and that contract took effect on 15 September 2021 when the contra arrangement was duly recorded into the defendant's records.

[14] Hence, the plaintiff's argued that for purposes of calculating the twilight period, the effective date for the contra arrangement should be on 15 September 2021 and that was seven months, three days before the defendant was placed under creditors' voluntary liquidation. In other words, there is no question of s. 528 of the Companies Act 2016 being triggered.

[15] Most pertinent is the case of *Sime Diamond Leasing (M) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557; [1998] 4 AMR 4141; [1998] 4 MLJ 569; [1998] 2 MLRA 82 ("*Sime Diamond Leasing*"), which the plaintiff argued supports its contention.

[16] It is apparent that the plaintiff also relied on another (alternative) ground, that is, s. 528(4) of the CA 2016, which it argued "provides for an exception to the stringent rule". On this ground, it cited the case of *Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor* [2016] 7 CLJ 823; [2016] 4 AMR 733; [2016] 5 MLJ 1; [2016] 5 MLRA 365.

[17] The plaintiff argued that the three requirements as laid down in s. 528(4) of the Companies Act 2016, that is:

(i) the transaction was in favour of a person dealing with the company;

(ii) the transaction was made in good faith; and

(iii) there was valuable consideration that are fulfilled in the present case.

[18] The plaintiff cited and relied on a number of authorities that discussed these requirements, namely, *Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] CLJU 44; [1988] 1 LNS 44; [1988] 2 MLJ

449; [1987] 1 MLRA 672, *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 CLJ 969; [2013] 3 AMR 93; [2013] 3 MLJ 313; [2013] 2 MLRA 657 and *Re Clifton Place Garage Ltd* [1970] 1 Ch 477.

[19] On the valuable consideration requirement, the plaintiff argued that the "contra arrangement", being "a debt-settlement exercise" between the plaintiff and the defendant falls within the definition provision of s. 528(5) of the Companies Act 2016.

[20] Last but not least, the plaintiff also averred that it had no knowledge of the creditors' voluntary liquidation. The plaintiff clarified that the contra arrangement was not the first debt repayment exercised between the defendant and the plaintiff. It argued that the very fact that this contra arrangement was entered into did not *ipso facto* mean that liquidation would be anticipated.

[21] The defendant's submissions in opposing the plaintiff's originating summons are premised on the sole ground that the material or effective date for purposes of determining whether a transaction, or as in this case the contra arrangement, was within or outside the six-month twilight period, is the date when the sale and purchase agreements were executed, that is, 14 December 2021.

[22] While conceding that the plaintiff accepted the contra arrangement as proposed in a letter dated 15 September 2021, it disagreed that the effective date of the contra agreement being 15 September 2021. According to the defendant, "the contra arrangement can only be deemed to have been valid and effective upon the execution of the sale and purchase agreements which formalises the intended arrangement between the parties" and "since the sale and purchase agreements were only executed on 14 December 2021, the effective date of the contra arrangement can only be on 14 December 2021, within the impugned period".

[23] Thus, the singular argument raised by the Liquidator for the defendant to resist the plaintiff's application is that "the factual matrix does not suggest that the contra arrangement qualifies within the limited ambit of exception to the rule against undue preference".

The Law And The Applicable Principles

[24] The law on undue or unfair preference aims at protecting the general body of creditors of companies which are insolvent. It does so by preventing such companies from dissipating its assets to a chosen or preferred creditor(s) and thus giving such creditor(s) an unfair preference over the other creditors. In the words of Edgar Joseph Jr FCJ in *Sime Diamond Leasing*, it "is designed to preserve the sanctity of the *pari passu* principle by which creditors in a winding up share rateably in the assets available for distribution".

[25] The law is encapsulated in s. 528 of the Companies Act 2016. It provides as follows:

Undue preference

528(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which is unable to pay its debts, as the debts become due, from its own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors in the event of the company being wound up on a winding up petition presented within six months from the date of making or doing the same and every such act shall be deemed fraudulent and void.

(2) The date of presentation of the winding up petition shall be:

(a) in the case of winding up by Court:

(i) the date of the presentation of petition; or

(ii) where prior to the presentation of the petition a resolution has been passed by the company for voluntary winding up, the date upon which the resolution to wind up the company voluntarily is passed; and

(b) in the case of voluntary winding up, the date upon which the winding up is deemed by this Act to have commenced.

(3) Any transfer or assignment by a company of all its property to the trustees for the benefit of all its creditors shall be void.

(4) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company in contravention of this section shall be void except if it is in favour of any person dealing with the company for valuable consideration and without any actual notice of the contravention.

(5) For the purposes of this section, "valuable consideration" means a consideration fair and reasonable money value in relation to:

(a) the value of the property conveyed, assigned or transferred; or

(b) the known or reasonably anticipated benefits of the contract, dealing or transaction.

(6) For the purposes of this section, "notice" includes knowledge of inability to pay a debt by the company or any winding up proceedings against the company or of the facts sufficient to indicate to the person dealing with the wound up company.

[26] The underlying rationale of the erstwhile provision in the Companies Act 1965 was explicated by the Federal Court in *Sime Diamond Leasing* as follows:

The principle of central importance underlying s. 293(1) of the Act is that where a debtor company, has at a relevant time, given a preference to any person, the liquidator may apply to the Court for an order under the section setting aside the preference.

[27] Applying the *dictum* of Edgar Joseph Jr FCJ in *Sime Diamond Leasing* to the present context of s. 528 of the Companies Act 2016, a court has no power to make an order setting aside payments and transfers made in the run-up to winding-up in favour of a particular creditor which were designed to prefer that creditor over other creditors unless the following five conditions are satisfied", that is, the transaction in question:

(i) took place within six months prior to the commencement of winding up;

(ii) fulfils one of the types of transactions described in s. 528(1) of the CA 2016;

(iii) took place when the company was insolvent;

(iv) benefits a person who was a creditor of the company; and

(v) has the effect of conferring that creditor a preference, priority or advantage over other creditors in the winding up of the company.

His Lordship further emphasised that "the onus was, of course upon the Liquidator to satisfy all the five requirements aforesaid".

[28] As the defendant has been placed under creditors' voluntary winding up since 18 April 2022, one must take cognisant of s. 451 of the Companies Act 2016. That section reads as follows:

> Property and proceedings
>
> 451(1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors' voluntary winding up shall be void.
>
> (2) After the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

[29] Equally pertinent to the present application is s. 461 of the Companies Act 2016.

> Application to Court to have questions determined or powers exercised
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> 461(1) The liquidator or any contributory or creditor may apply to the Court:
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> (a) to determine any question arising in the winding up of a company; or
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> (b) to exercise all or any of the powers which the Court may exercise if the company is wound up by the Court.
>
> (2) The court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as the court thinks fit or may make any other order on the application as the court thinks just.

Decision Of This Court

[30] As a preliminary point, leave of court is required for this action to proceed. This is because the present originating summons application relates to property and proceedings after the commencement of a creditors' voluntary winding up as envisaged in s. 451(1) of the Companies Act 2016.

[31] This court has examined the authorities cited by the plaintiff, namely, *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] CLJU 47; [1985] 2 MLJ 446; [1985] 1 MLRA 558 and *TIC Technologies Sdn Bhd (In Liquidation) v. Mohamad Suhaimi Mohamed Taib & Ors* [2019] 9 CLJ 422; [2019] 3 AMR 396; [2019] MLJU 329; [2019] 5 MLRH 248 and is of the considered view that this is an appropriate case where leave should be granted pursuant to s. 451(2) of the Companies Act 2016.

[32] On the substantive question posed to this court, the plaintiff is invoking s. 461(1) of the Companies Act 2016 in seeking this court to exercise its powers to make a number of orders prayed for in this originating summons application. Pursuant to s. 461(2) of the Companies Act 2016, this court must be satisfied that the exercise of power will be just and beneficial.

[33] As noted, the originating summons herein seeks to validate five sale and purchase agreements dated 14 December 2021 entered into between the plaintiff and the defendant in respect of five units of service apartments that was part of a project developed by the defendant. These sale and purchase agreements were entered as a result of a contra arrangement that was accepted by the plaintiff as proposed in a letter dated 15 September 2021 (pre-liquidation), where the defendant offered to the plaintiff, the unsold service apartments located at the project to contra off its purported debt of RM11,100,187.91 due and owing to the plaintiff under a purported Claim No. 73.

[34] The above factual background brings into focus the first of the five conditions alluded to by the Federal Court in *Sime Diamond Leasing*, that is, whether the contra arrangement in the present case had taken place within six months prior to the commencement of the creditors' voluntary winding up.

[35] Before we answer this pivotal question, it is apt that we recollect the key dates in this case. The important dates are:

(i) 18 April 2022 – when the defendant company was placed in creditors' voluntary liquidation;

(ii) 18 October 2021 – six months preceding the creditors' voluntary winding-up;

(iii) 15 September 2021 – when the plaintiff and the defendant entered into a contra arrangement (outside the six-month period); and

(iv) 14 December 2021 – when the sale and purchase agreements between the parties ("SPAs") were executed (within the six-month period).

These dates may be illustrated in the diagram below.

[36] In *Sime Diamond Leasing*, the Federal Court was confronted with a similar predicament, of having to determine whether a right of set-off, in effect, would give the lessor in that case an undue preference over the general body of creditors, contrary to s. 293 of the Companies Act 1965 (the erstwhile provision to the present s. 528 of the Companies Act 2016).

[37] In that case, the appellant ('the lessor') had entered into an equipment lease agreement dated 30 December 1988 ('the agreement') whereby it had leased to the respondent ('the lessee'), one unit of plastic injection moulding machine with all deposits duly paid. The additional background facts, together with the the ensuing proceedings and issues were outlined by the Federal Court as follows:

> Clause 14.1(g)(ii) of the Agreement provided, *inter alia*, that in the event of a Winding-Up Petition being presented against the Lessee, the Lessor shall be entitled by written notice to determine and end the Lease and to retake possession of the equipment.
>
> In the events which happened, on 27 March 1990, the Lessor gave Notice of Termination of the said Agreement on the ground that the presentation of the Winding-up Petition constituted a breach of the Agreement and, at the same time, demanding payment of the amount outstanding after setting-off the deposits pursuant to cl. 4.3 of the Agreement which provided, *inter alia*, that if the Lessee is in default under any of the provisions of the Agreement, including events referred to in cl. 14, then the Lessor shall be entitled to apply the deposits or any part thereof against the amount outstanding under the Agreement.
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> Then, on 4 April 1990, the Lessee was wound up and a Liquidator appointed. On 23 April 1990, the Liquidator demanded from the Lessor the return of the deposits but the Lessor refused to comply.

The Proceedings

In the upshot, the Liquidator applied by way of Originating Motion for the refund of the deposits, which had been set-off by the Lessor. The Liquidator relied on the following grounds:

(1) the deposits paid by the Lessee belonged to the estate of the Lessee, this was so, because the Lessor being neither a secured creditor nor a preferential creditor within the meaning of s. 2 of the Bankruptcy Act 1967, and s. 292 of the Companies Act 1965, respectively, was not entitled to keep the same;

(2) the deposits represented the assets of the Lessee and thus the Liquidator must take under s. 233 of the Companies Act; and

(3) the forfeiture by the Lessor of the deposits was void against the Liquidator and amounted to a fraudulent undue preference under s. 223 and s. 293 of the Companies Act, read with s. 53 of the Bankruptcy Act.

The case of *Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 was cited in support.

We hope it is not an unfair summary of the submissions of Counsel for the Lessee if we put his case thus: upon presentation of the petition – that being the material date – see, *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573 – the claim in respect of the deposits had been reduced to a right of proof and that any other method of claiming the deposits would be barred by the *pari passu* principle of distribution which is fundamental and all pervasive being enshrined in s. 264 and supported by ss. 222, 223 and 224 of the Companies Act. Furthermore, – so the submission ran – to give the Lessor the right of set-off, in the particular circumstances of this case would, in effect, give it an undue preference, over the general body of creditors, contrary to s. 293 of the Companies Act, read together with s. 53(1) of the Bankruptcy Act, and so the provisions of the Agreement which purport to give the right of set-off should be struck down as being in violation of those provisions, and, therefore, void.

Both in the High Court and the Court of Appeal (Abdul Malek Ahmad JCA, dissenting), the Liquidator succeeded (see [1997] 1 MLJ 499). The Lessor then appealed to this Court pursuant to leave to appeal having been granted.

…

The Issues

It is against the background of the general remarks aforesaid that we turn to consider the two key issues which arise for decision in this appeal; namely:

(1) whether the set-off pursuant to cl. 4.3 of the Agreement was a voidable preference under ss. 223 and 293 of the Companies Act, read together with s. 53(1) of the Bankruptcy Act?

(2) If 'no', then whether, the set-off pursuant to the Agreement was authorized by s. 41 of the Bankruptcy Act, which is made applicable to insolvent companies by s. 291 of the Companies Act?

[38] Of relevance to us in the present case is Issue (1), which in that case the Federal Court answered in the negative. In considering the question whether there has been a disposition within the terms of s. 223 of the Companies Act 1965, the Federal Court held that:

> … the relevant date is not the date of the set-off but the date of the transaction. Thus, we are here concerned with a transaction which had been concluded long before the onset of the twilight period – statutorily defined as six months prior to the commencement of the winding up.

[39] The Federal Court explained and reasoned as follows:

> The principle of central importance underlying s. 293(1) of the Act is that where a debtor company, has at a relevant time, given a preference to any person, the liquidator may apply to the Court for an order under the section setting aside the preference.
>
> The object of the rules of bankruptcy as to fraudulent preferences is to prevent a creditor from obtaining for himself an unfair advantage at the expense of other creditors by concluding a transaction with the company during what has been called the twilight period which precedes winding up. Bearing this in mind, it is difficult to see how, in the present case, it could be said that the relevant date for determining whether the Liquidator had satisfied the requirements was the date of the set-off. After all, the claim for a set-off in respect of the deposits arose out of a transaction which took the form of the Agreement pursuant to which the deposits were paid as evidenced by the Memorandum of Deposit, execution of both these documents and the payment having been effected contemporaneously, on 30 December 1988, that is to say, as far back as 11 months before the presentation of the Winding Up Petition.

[40] Following the line of reasoning as outlined by the Federal Court in *Sime Diamond Leasing*, the relevant date for purposes of determining whether the debt settlement exercise in the form of a contra arrangement was made within or outside the twilight period as provided in s. 528 of the Companies Act 2016 is the date when the parties agreed to the contra arrangement, that is, 15 September 2021 and not the date of the execution of the sale and purchase agreements on 14 December 2021.

[41] In view of the conclusion that this court has arrived at, the plaintiff's application in encl. 1, namely prayers (1)-(7) is allowed.

[42] Each party to bear its own costs.